IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

SHARON A. COOPER,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO.: 1:04-CV-18
	)	
JO ANNE B. BARNHART,	)	
Commissioner of Social Security,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER

I. INTRODUCTION

Plaintiff Sharon Cooper ("Cooper") seeks judicial review[1] of the final decision of the Defendant Commissioner of Social Security, Jo Anne Barnhart ("Commissioner"), who found that Cooper was not entitled to Supplemental Security Income ("SSI") or Social Security Disability Insurance Benefits ("DIB").

For the following reasons, the Commissioner's final decision will be AFFIRMED IN PART AND REVERSED AND REMANDED IN PART.

II. FACTUAL AND PROCEDURAL BACKGROUND

Alleging a disability onset date of November 14, 1999, due to anemia, obesity, and a bleeding ulcer, Cooper filed her applications for SSI and DIB on June 13, 2000. (Tr. 242-244.) Social Security and the administrative law judge (ALJ) denied her claim, and the Appeals Council denied review by upholding the decision of the ALJ, which then became the final decision of the Commissioner. 20 C.F.R. § 404.981.

[1]All parties have consented to the Magistrate Judge. *See* 28 U.S.C. § 636(c).

A. Medical Evidence

Complaining of shortness of breath and excessive swelling, Cooper went to Parkview Hospital on March 13, 2000. (Tr. 133.) She told the attending emergency room physician that she had recently experienced a dramatic weight gain, and she speculated that she weighed over 300 pounds. (Tr. 133.) She was initially diagnosed with anasarca and eventually admitted due to severe anemia. (Tr. 127, 134.) After Dr. Vallion, a hematologist, examined her the next day, he diagnosed her with severe iron deficiency (undetermined cause), possible thalassemia, multi-organ failure secondary to anemia, and massive obesity. (Tr. 128.) At her release five days later, she weighed over 400 pounds and was given instructions to continue her medication and follow up with Dr. Vallion in several weeks. (Tr. 131.)

On March 31, 2000, she returned to the same emergency room because she was vomiting blood. (Tr. 175.) Dr. Horani performed an upper endoscopy, which revealed multiple gastric ulcers. (Tr. 180.) Because of exceptionally low hemoglobin, she was treated with a blood transfusion and received two units of packed cells. (Tr. 169.) She was discharged five days later in stable condition with no limits placed upon her diet or activity.[2]

She began follow-up treatment with Dr. Vallion on April 11, 2000, and saw him bimonthly thereafter.[3] At the April 11, 2000, visit, Dr. Vallion noted that she had lost most of

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[2]Her complete discharge diagnosis includes the following: (1) anemia, (2) peptic ulcer disease, (3) obstructive liver disease, (4) asymptomatic gallstones, (5) elevated sedimentation rate of unknown etiology, (6) urinary tract infection, (7) sinus congestion, (8) history of edema - resolved, (9) mild hypokalemia - resolved, and (10) cardiomegaly. (Tr. 169.)

[3]Dr. Vallion's office records indicate that he examined Cooper on April 11, 2000; June 13, 2000; August 8, 2000; and on October 17, 2000. In a letter to the ALJ dated May 10, 2001, Cooper's attorney indicates that Cooper saw Dr. Vallion on November 21, 2000, and that she "has also had one or two appointments with Dr. Vallion in 2001, and she continues to see him approximately bimonthly." (Tr. 122.) However, the October 17, 2000, visit is the last one in the record.

the edema (associated with her 3/13/01 hospitalization) and recommended she return in two months for follow-up. (Tr. 213.) At her follow-up on June 13, 2000, he noted that although she had no acute problems, her abdomen and legs were obese. (Tr. 212.) On August 8, 2000, he stated she had completely eliminated her edema and diagnosed her with iron deficiency, hypertension, and a history of menstrual irregularity. (Tr. 211.)

On August 17, 2000, at the request of Social Security, Dr. Kancherla examined Cooper, who was then five feet five inches tall and weighed 270 pounds. (Tr. 190.) Dr. Kancherla determined that her overall physical exam was essentially normal and concluded that the only significant findings were 1) elevated blood pressure (200/110) with occasional dizziness, 2) AV nicking abnormalities without any hemorrhages, exudates, or papilledema on her fundal exam, and 3) history of anemia and peptic ulcer disease that was stable on medication. (Tr. 191.)

She then saw Dr. Vallion for a follow-up exam on October 17, 2000, at which he made the following diagnosis: 1) iron deficiency anemia (resolved), 2) hypermenorrhia, and 3) pathological obesity. (Tr. 210.) Finally, on November 21, 2000, Dr. Vallion scribbled a note to Cooper's attorney in which he provided the following statement:

> Ms. Cooper was recently hospitalized with severe anemia and multi-organ failure. The anemia has recovered but she still has a significant inability to work because of pain and weakness. She has a problem of obesity that is being addressed with help from a dietician. It is unlikely that she will be able to work in a gainful manner in the next six months.

(Tr. 214.)[4]

In October of 2000, she experienced numbness in her legs and began seeing Dr. Phillip Johnson, a family doctor. (Tr. 203.) She continued to follow up with him for weight control on

[4]There is no office record indicating that Dr. Vallion examined Cooper on this date; it appears he only provided this opinion.

almost a monthly basis until March 27, 2001. (Tr. 225-234.)

B. Administrative Hearing

On May 11, 2001, the ALJ conducted a hearing in this matter at which Cooper testified that she did not complete her high school education. (Tr. 33.) She had been employed as a certified nurse's assistant for twenty years but quit in November of 1999 because her legs were getting too big, and she could not properly care for her patients. (Tr. 33-34.) She felt she could not return to her past relevant work as a nurse's assistant because of problems with her thyroid gland and weakness in her legs. (Tr. 37.)

She currently weighs about 250 pounds and is five feet four and a half inches tall. (Tr. 32.) She cannot walk long distances because she experiences numbness in her legs, and she cannot stand for long periods of time for the same reason. (Tr. 40-41.) If she stands or sits for longer than twenty-five minutes, her legs and back hurt, and then she must elevate her legs. (Tr. 48-49.) She has been homebound since November 1999 yet is still able to care for herself, occasionally attend church, and assist her daughter with getting ready for school. (Tr. 51-55.) On average, she has four bad days per week where she experiences throbbing pain in her legs, becomes dizzy, and is only capable of reading. (Tr. 55.)

Charles Pearson, Cooper's friend and father of her daughter, testified that he was currently living with Cooper so that he could help out financially and with the household. (Tr. 58-59.) He cleans the house, maintains her car, and helps prepare meals. (Tr. 59.) He explained that Cooper can do laundry and some cleaning, but that she must take breaks. (Tr. 60.) If she's feeling well, Cooper will also go along with him to do the grocery shopping, but she does not lift anything. (*Id.*)

The Vocational Expert, Dr. Robert Barkhaus, testified that a person with limitations similar to Cooper's could not return to her past work as a nurse's assistant, which was classified at the medium level of exertion, but would be able to perform sixty to seventy percent of jobs classified in the light level of exertion and all jobs at the sedentary level. (Tr. 63-64.) He estimated that in the northeast region of Indiana, there were four to five thousand jobs (this number takes into account the thirty percent reduction) at the light, unskilled level of exertion and two thousand sedentary, unskilled jobs. (Tr. 65.)

III. STANDARD OF REVIEW

Section 405(g) of the Social Security Act ("Act") grants this Court "the power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the [Commissioner], with or without remanding the case for a rehearing." 42 U.S.C. § 405(g).

The Court's task is limited to determining whether the ALJ's factual findings are supported by substantial evidence, which means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Young v. Barnhart*, 362 F.3d 995, 1001 (7th Cir. 2004). The decision will be reversed only if it is not supported by substantial evidence or if the ALJ applied an erroneous legal standard. *Clifford v. Apfel*, 227 F.3d 863, 869 (7th Cir. 2000).

To determine if substantial evidence exists, the Court reviews the entire administrative record, but does not reweigh the evidence, resolve conflicts, decide questions of credibility, or substitute its judgment for the Commissioner's. *Id.* Rather, if the findings of the Commissioner are supported by substantial evidence, they are conclusive. *Jens v. Barnhart*, 347 F.3d 209, 212 (7th Cir. 2003). Nonetheless, "substantial evidence" review should not be a simple rubber-stamp

of the Commissioner's decision. *Clifford*, 227 F.3d at 869.

IV. DISCUSSION

Under the Act, a plaintiff is entitled to DIB if she establishes an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to . . . last for a continuous period of not less than 12 months." 42 U.S.C. § 416(i)(1); 42 U.S.C. § 423(d)(1)(A). A physical or mental impairment is "an impairment that results from anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3).

In determining whether Cooper is disabled as defined by the Act, the ALJ conducted the familiar five-step analytical process, which required him to consider the following issues in sequence: (1) whether the claimant is currently unemployed; (2) whether the claimant has a severe impairment; (3) whether the claimant's impairment meets or equals one of the impairments listed by the Commissioner, *see* 20 C.F.R. § 404, Subpt. P, App. 1; (4) whether the claimant is unable to perform her past work; and (5) whether the claimant is incapable of performing work in the national economy. *See* 20 C.F.R. § 404.1520; *Dixon v. Massanari*, 270 F.3d 1171, 1176 (7th Cir. 2001). An affirmative answer leads either to the next step or, on steps three and five, to a finding that the claimant is disabled. *Zurawski v. Halter*, 245 F.3d 881, 886 (7th Cir. 2001). A negative answer at any point other than step three stops the inquiry and leads to a finding that the claimant is not disabled. *Id.* The burden of proof lies with the claimant at every step except the fifth, where it shifts to the Commissioner. *Clifford*, 227 F.3d at 868.

In a written decision issued on May 8, 2003, the ALJ found that although Cooper could

not perform her past work as a nurse's assistant, she retained the RFC to perform a significant range of light work and as a result, she was not entitled to a period of disability, DIB or SSI. (Tr. 13-20.) In reaching this decision, the ALJ rejected the opinion of her treating physicians, Drs. Vallion and Johnson, because their opinions were not based upon close observation of her functioning and were not consistent with the relatively normal and recovered status reflected in their office notes. (Tr. 17.) Instead, he relied upon the opinion of Dr. Kancherla, the consulting examiner. (*Id.*) He also concluded that the opinions of the State Agency physicians were not entitled to significant weight because they did not treat or examine Cooper, and their opinions were poorly articulated and presented no independent analysis. (Tr. 17-18.) Finally, the ALJ also felt that Cooper's testimony discussing her impairments was not reliable because her allegations of limitations were inconsistent with her account of daily activities and her medical record. (Tr. 16.)

Nevertheless, the ALJ determined that her RFC did not permit her to return to her past relevant work as a nurse's aid because it was classified as medium, unskilled work, which she was not capable of performing. (Tr. 18.) Even though her exertional limitations would not allow her to perform the full range of light work, under Medical-Vocational Rule 202.20, there was significant number of jobs in the national economy she could perform. (Tr. 20.)

Cooper contends the ALJ improperly evaluated the opinion of one of her treating physicians, Dr. Vallion, and improperly evaluated her testimony, which in turn led to the flawed conclusion at step five that she retained the RFC to perform a significant number of jobs at the light exertional level. The RFC is an assessment of what work-related activities the claimant can perform despite her limitations. *See* 20 C.F.R. § 404.1545(a)(1) (stating that one's residual

functional capacity is the most one can still do despite any limitations). Finally, Cooper maintains that at Step 5, the ALJ failed to comply with Social Security Regulation ("SSR") 83-14 because he failed to cite examples of jobs Cooper could functionally and vocationally perform. Each of Cooper's arguments will be considered in turn.

A. The ALJ's determination that Dr. Vallion's opinion is not entitled to controlling weight is supported by substantial evidence.

The opinion of a treating physician who is familiar with the claimant's impairments, treatments, and responses should be given great weight in disability determinations because of a greater familiarity with the claimant's conditions and circumstances. *Clifford v. Apfel*, 227 F.3d 863, 870 (7th Cir. 2000). If the ALJ finds that the treating physician's opinion is "well-supported by medically acceptable [evidence] and is not inconsistent with the other substantial evidence in [the] record," it will be given controlling weight. 20 C.F.R. § 404.1527(d)(2). However, "a claimant is not entitled to disability benefits simply because her physician states that she is 'disabled' or 'unable to work' because a treating physician may bring biases to an assessment." *Dixon v. Massanari*, 270 F.3d 1171, 1177 (7th Cir. 2001). The Commissioner, not a doctor selected by a patient to treat her, decides whether a claimant is disabled. *Id.*; 20 C.F.R. § 404.1527(e)(1).

Pursuant to these regulations, the Social Security Administration is required to explain the weight it gives to the opinions of treating physicians. 20 C.F.R. § 404.1527(d)(2) ("We will always give good reasons in our notice of determination or decision for the weight we give your treating source's opinion.") Failure to provide good reason for discrediting a treating source's opinion is grounds for remand. *Clifford*, 227 F.3d at 870. Nevertheless, a treating physician's opinion that a claimant is disabled cannot be conclusive because the ultimate determination of

whether a claimant is disabled is reserved to the Commissioner. 20 C.F.R. § 404.1527(e)(1).

The ALJ rejected Dr. Vallion's opinion in part because it was not based on close observation of the claimant's functioning. (Tr. 17.) Cooper's contention that this reason places an "extra-legal requirement" on treating physicians is wrong. Rather, the ALJ was obviously referring to and applying 20 C.F.R. § 1527(2), which catalogs the factors that must be considered in determining whether the opinion of a treating source is to be given controlling weight, such as the length of the treatment relationship and the frequency of examination, 20 C.F.R. § 1527(2)(i), and the nature and extent of the treatment relationship, 20 C.F.R. § 1527(2)(ii). Dr. Vallion initially evaluated Cooper upon her March 13, 2000, admission to the hospital. Contrary to what Cooper argues, the medical record does not indicate that he saw her when she was admitted to the hospital on March 31, 2000. (Tr. 169-186.) After his initial evaluation, he saw her four more times (April 11, June 13, August 8, and October 17) for follow-up visits. Then, on November 21, 2000, he wrote a note to her attorney in which he indicated that Cooper could not work for six months because of pain and weakness, which were apparently related to her recent hospitalization concerning severe anemia and multi-organ failure.[5] There is no indication that Dr. Vallion examined Cooper on November 21, 2000, before he jotted this note to her attorney. Thus, the ALJ's point that Dr. Vallion had examined her only five times[6] is well-supported. The ALJ placed no "extra-legal requirement" on Cooper's treating physician; rather, he considered the relatively short nature of the relationship and bimonthly examination schedule as factors for

[5]Presumably, the "recent" hospitalization to which he referred was either that of March 13, 2000, or March 31, 2000.

[6]At the hearing on May 11, 2001, Cooper testified that she had only seen Dr. Vallion for follow-ups, and that May 10, 2001, was her last visit. (Tr. 46.)

not giving Dr. Vallion's opinion controlling weight.

Significantly, the ALJ also articulated another reason for not giving Dr. Vallion's opinion controlling weight; he rejected it because, as he put it, it was not consistent with Cooper's "relatively normal and recovered status [as] reflected in [the doctor's own] notes." (Tr. 17.) The ALJ's statement is a fair characterization; for instance, at the October 17, 2000, exam, Dr. Vallion noted that Cooper's iron deficiency anemia had resolved and that her extremities had no edema. (Tr. 210.) His remaining impression indicated she had hypermenorrhia and pathological obesity. (Tr. 210.) As the ALJ accurately noted, Dr. Vallion's own office records indicate that by October, Cooper had recovered from the edema and multi-organ failure that caused her March hospitalizations, yet with no further elaboration, he inexplicably characterized her condition in November as so weakened that she would be unable to work for the next six months.

This last conclusion led the ALJ to decide that Dr. Vallion's November 21, 2000, opinion was not supported by any objective medical evidence, or any evidence whatsoever. Furthermore, the ALJ accurately noted that "[Dr. Vallion's] conclusion about her employability implies an expert knowledge of work in the economy that he does not possess."[7] *See* 20 C.F.R. § 1527(e)(1) (noting that Social Security is responsible for making the determination of whether a claimant is disabled and that a statement by a medical source that you are "disabled" or "unable to work" does not mean Social Security will determine claimant is disabled). Thus, the ALJ's decision that Dr. Vallion's opinion was not entitled to controlling weight is supported by substantial evidence.

[7]The ALJ also rejected Dr. Vallion's opinion, in part, because he appeared unfamiliar with Cooper's daily activities and functions. Indeed, there is no evidence that Dr. Vallion had any such knowledge, and thus the ALJ's opinion is supported on this basis as well.

B. The ALJ's evaluation of Cooper's testimony is supported by substantial evidence.

Cooper contends that the ALJ "impermissibly extrapolated from a few of her daily living activities [the conclusion] that she could perform them on a sustained basis." (Pl.'s Opening Brief at 9.) The ALJ did no such thing; rather, the ALJ determined that Cooper's testimony was not credible when she characterized her limitations as disabling. One reason the ALJ gave for reaching this conclusion is Cooper's description of her daily activities, which include cooking, driving, walking, and caring for her child, even though Cooper testified she performs most of these activities for limited periods of time and then rests. For instance, Cooper testified she does not cook much because she cannot stand on her legs long enough to cook a full course meal. (Tr. 41.) Her boyfriend does most of the shopping, but she rides with him. (*Id.*) After standing more than twenty-five minutes, her legs become numb, and she must elevate them. (Tr. 48.) Contrary to what Cooper claims, however, the ALJ did not say that she could perform these activities on a sustained basis, but merely took them into account in determining that her claims of limitation were not reliable.

Moreover, the ALJ also found that Cooper's testimony was unreliable because her claimed limitations were not supported by her medical records. Despite reaching an alarming weight of over 400 pounds in her March 2000 hospitalization, the ALJ noted that her weight was promptly addressed and came under quick medical management. At the time of the hearing, she estimated that she weighed about 240 to 250 pounds. Furthermore, her complaints of disabling fatigue were not supported by either of her treating physicians. In October 2000, Dr. Vallion noted she had recovered from the multi-organ failure associated with her obesity. In addition, her anemia had apparently resolved itself with the help of medication. Her obesity was being

addressed with the help of a dietician, and her current medication was causing her no problems.

Because the ALJ is best-positioned to evaluate the credibility of a witness, his determination generally will not be overturned unless it was "patently wrong." *Powers v. Apfel*, 207 F.3d 431, 435 (7th Cir. 2000). Overall, Cooper's arguments do not overcome this court's deference to the ALJ's credibility determination, specifically his subjective observations. *Id*.

Finally, the ALJ noted that Cooper's claim that she could not sit for longer than twenty minutes was contradicted by her competent performance at the hearing, during which she sat easily for more than forty minutes. And although the Seventh Circuit has expressed some reservations about the "sit and squirm" test, it still defers, as we do, to the ALJ's critical, first-hand observations and resulting credibility determinations. *Id*. at 436. Therefore, given the ALJ's subjective determination and his heavy reliance on what we have determined to be his correct analysis of Cooper's medical progression, the Court does not find the ALJ's credibility determination to be patently wrong.

C. The ALJ failed to comply with SSR 83-14.

Cooper also argues that this case should be remanded because the ALJ's decision fails to cite examples of occupations/jobs that she can functionally and vocationally perform.

SSR 83-14 provides as follows:

> . . . whenever vocational resources are used, and an individual is found to be not disabled, the determination or decision will include: (1) citations of examples of occupations/jobs the person can do functionally and vocationally and (2) a statement of the incidence of such work in the region in which the individual resides or in several regions of the country.

The Seventh Circuit has confirmed that Social Security rulings are binding on the Social Security Administration. *Prince v. Sullivan*, 933 F.2d 598, 602 (7th Cir. 1991).

Here, the ALJ stated "The vocational expert testified that jobs exist in the national economy for an individual of the claimant's residual functional capacity. The expert stated that she is capable of making a vocational adjustment to other work. He testified that in light of these limitations, she would be unable to perform 70% of the jobs at the light level. He estimated that in the claimant's region, there are 5,000 unskilled jobs at the light level of exertion. He observed that there would be no erosion of the work at the sedentary level of exertion, at which level he stated that there were 2000 unskilled jobs in the claimant's region." (Tr. at 19.)

Despite the ALJ's ultimate conclusion that Cooper could perform a substantial amount of jobs at the light exertional level in northeast Indiana, he failed to elicit from the VE any "examples or occupations/jobs [Cooper] can do functionally and vocationally" as SSR 83-14 requires. Indeed, the ALJ merely parroted the VE's conclusory testimony with no analysis whatsoever. His failure to identify examples of jobs or occupations Cooper could do was legal error, requiring remand. *See Prince,* 933 F.2d at 602-03 ("Although this court reviews the ALJ's determination for substantial evidence, we are not in a position to draw factual conclusions on behalf of the ALJ . . . [and] we will hold ALJs to the requirement set out in [SSRs] by the Secretary."); *Lovellette v. Barnhart*, No. 1:02-CV-278, 2003 U.S. Dist. WL 21918642, at *12 (N.D. Ind. June 25, 2003) (concluding that ALJ's failure to state in his decision what jobs the claimant had the capacity to perform was legal error requiring remand).[8]

Because the ALJ failed to elicit and cite specific examples of occupations or jobs Cooper could perform, the Commissioner did not meet her burden of proof at step five. Thus, the ALJ's decision that there are a significant number of jobs in the national economy at the light level of

[8]This is the second time the Court has reversed this ALJ for failing to comply with SSR 83-14. *See Lovellette*, 2002 WL 21918642 at *12.

exertion which Cooper could perform is unsupported by substantial evidence.

V. CONCLUSION

In sum, the ALJ's decision to not give Dr. Vallion's opinion controlling weight is supported by substantial evidence, as is the ALJ's credibility determination with respect to Cooper's testimony. However, the ALJ's step five decision is not supported by substantial evidence because the ALJ failed to list jobs or occupations which Cooper could perform. For this reason, the decision is hereby REVERSED and REMANDED to the Commissioner for further findings consistent with this opinion. SO ORDERED.

Enter for September 28, 2004.

s/Roger B. Cosbey
Roger B. Cosbey,
United States Magistrate Judge